Court No.3

Criminal Jail Appeal No. 97/2001

Harphool Singh S/o Om Solanki,
R/o Raghubir Nagar near Ghodewala Mandir,
P.S. Raja Garden, New Delhi .. Appellant.

Vs.

State .. Respondent.

Date of delivery of judgment 24-9-2003

Hon'ble P.C. Verma,J.
Hon'ble Irshad Hussain, J.

Delivered by Hon'ble Irshad Hussain, J.

This criminal appeal is directed against the judgment and order dated 27-2-2001 passed by Sessions Judge, Pauri Garhwal in Special Trial Nos. 10 and 11 of 1999, whereby the accused-appellant was convicted under section 8/20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act') for being in illegal possession of 100 grams of Charas and two quintals of Ganja (Bhaang) at about 5.30 p.m. on 15-11-1998 near Bhushan Hotel, bus stand Kotdwara and sentenced him to undergo 10(ten) years R.I. and to pay fine of Rs. one lac under the first count and 15(fifteen) years R.I. and fine of Rs. one lac fifty thousands under the second count.

(2). The prosecution story in brief is that Sub-Inspector Y.P.C. Bhadoria and other police personnel were on law and order duty in the market of town of kotdwara on 15.11.1998. He got an information that accused-appellant who has in his possession illegal Charas and nine bundles of Ganja (Bhaang) had un-boarded a passenger bus at bus stand is waiting for another passenger bus for onward journey to Delhi. The Sub-Inspector made efforts to procure public witnesses but none agreed. He, therefore, along-with Sub-Inspector Sambhoo Dutt Sharma (P.W.1) and constable Wahid Hassan (P.w.2) and others reached the pointed place. At about 5.30 p.m. the accused-appellant was arrested near Bhushan Hotel at the bus stand while he was sitting on the bundles kept there. On query he disclosed his name. before taking his search he was asked as to whether he would like to be searched before the Circle Officer or the Munsif Magistrate but he refused to

be taken before these gazetted Officers for search. The bundles were found to contain about two quintals of Ganja (Bhaang). On personal search about 100 grams of Charas wrapped in a blue polethene was found in the pocket of his pant besides a sum of Rs. 70/- and a ticket from Kotdwara to Delhi.

(3). Sample of Ganja weighing about one kilogram was taken from each of the nine bundles and then these packets were then properly packed and sealed. Recovered Charas was also sealed. The accused-appellant had no licence to possess the contraband.

(4). Sub-Inspector Y.P.S. Bhadolia then got prepared the memo of search, recovery and arrest of the accused-appellant in the hand writing of P.W.1. The information of his arrest was sent on the Delhi address of the accused-appellant. The accused-appellant was then brought to the Police Station Kotdwara where at 7.00 p.m. the same day i.e. 15.11.1998 F.I.R. was lodged on the basis of aforesaid memo (Ex.Ka-3). Check F.I.R. (Ex.Ka-4) was then prepared and separate case crime Nos. 745/ 1998 and 746/1998 were registered in relation to the illegal possession of both the varieties of contraband.

(5). Samples of the contraband were sent for chemical analysis and the separate reports, Ex.Ka.1 and Ex.Ka.2 confirmed that recovered 100 grams was Charas and the other item was Ganja (Bhaang). On completion of investigation the I.O. submitted separate charge sheets Ex.Ka.9 and Ex.Ka.10. This is how the two special Trial Nos.10 and 11 and 1999 were consolidated for trial by the Sessions Judge, Pauri, Garhwal and were decided by the judgment mentioned above.

(6). The accused-appellant pleaded not guilty and contended that he has been falsely implicated in the case by the police. He stated that he was waiting for the passenger bus after purchasing a ticket at about 3.00 p.m. from where he was arrested and was implicated in the case.

(7). In order to prove its case the prosecution had examined Sub Inspector Shambhoo Dutt Sharma (P.W.1) and constable Wahid Hassan (P.W.2). Both of whom were the members of the police party who had gone for the purpose of patrolling and to maintain law and order in the town of Kotdwara. They narrated the porsecution story in their evidence. P.W.1 also proved the recovered contraband Charas (Ex-1) and Ganja (Bhaang) (Ex.8)

as well as memo of search, recovery and arrest (Ex.Ka.3) which was prepared by him on the dictation of the complainant S.I. Y.P.S.Bhadoria.

(8). P.W.3, S.I. R.K.Sharma has investigated the case and he proved steps taken in that regard and the charge sheets filed against the accused-appellant.

(9). P.W.4, constable 105 Than Singh took samples for chemical analysis vide authority letters, Ex.Ka.7 and Ex.Ka.8. He testified that the packets of the samples were received duly sealed and were delivered to the Chemical Analyst in that very state without these being tampered with in any manner whatsoever.

(10). P.W.5, constable Mohmmad Salim formally proved G.D. entries of registration of the case and copies filed on record as, Ex.Ka.11 and Ex.Ka.12.

(11). The trial court believed the evidence of both the witnesses of the fact and further held that the defence raised by the accused-appellant in his statement under section 313 of the Code of Criminal Procedure that he was falsely involved by the police was an after-thought. The learned Sessions Judge therefore convicted and sentenced the accused-appellant as mentioned above.

(12). Heard Mrs. Pushpa Joshi Advocate, Amicus Curiae and learned G.A. and have considered the evidence in the light of the legal aspects of the case.

(13). The learned Amicus Curiae in assailing the conviction of the accused-appellant contended that the mandatory provisions of section 50 of the Act have not been complied with and further that the seizure being shown from a crowded and busy place i.e. the bus stands, the absence of public witness create grave doubt in the claim of the prosecution and that the learned trial court made an error in placing implicit reliance on the evidence of police witnesses. It was also submitted that the evidence of P.W.1 and P.W.2, the two witnesses of the alleged recover, is not trustworthy.

(14). On a prior information the suspect accused-appellant was required to be search. The Constitution Bench of the Apex Court in the case of *State of Punjab Vs. Baldev Singh; (1999) 6 S.C.C. 172,* held that it is an obligation of the empowered Officer and his duty before conducting the search of a person of a suspect, on the basis of prior information to inform the suspect that he has the right to require his search being conducted in the presence of

a gazetted officer or a Magistrate and the failure to so inform the suspect of his right would render the search illegal because the suspect would not be able to avail of the protection which is in built in section 50 of the Act. As stated above the evidence of the prosecution to prove due compliance of the above mandatory provisions consists of the statement of S.I. S.D. Sharma (P.W.1) and constable Wahid Hassan (P.W.2). They stated that accused-appellant was told that he is the suspect of possessing contraband and gave him understanding that he has the option to be searched before the Magistrate or a gazetted officer. The accused-appellant did not opt to be searched as such and volunteered to be put to search by the leader of the police party and his team. The evidence of both these witnesses is consistent on this point. P.W.1 also proved memo of search, recovery and arrest of the accused-appellant, Ex.Ka.3. It was scribed by him on the dictation of S.I. Y.P.S. Bhadoria. Both the P.w.1 and P.W.2 supported the case of the prosecution about due preparation of the said memo at the spot itself. The evidence of these witnesses is also consistent on the point that from the pocket of the pant of the accused-appellant about 100 grams of Charas was recovered. The accused-appellant was found sitting on the bundles of 'Ganja' near Bhushan Hotel at bus stand Kotdwara. The evidence is thus definite that the accused-appellant was in conscious possession of the contraband and sample of which, as stated above, was properly taken and packed and sealed for the purpose of chemical analysis. It need to be mentioned here that both witnesses have not been cross examination on the proper manner of taking samples and packing the contraband and putting seal on the packets thereon and therefore the evidence of the prosecution in this regard is credible.

(15). Learned Amicus Curiae submitted that the recital of the memo,Ex.Ka.3 as well as evidence of these witnesses do not prove due compliance of the provisions of section 50 of the Act, in Ex.Ka.3 the Magistrate has been referred to as "M.M." meaning thereby "Munsif Magistrate"and gazetted officer has been referred to as "C.O. Kotdwara" and pointing out to these descriptions it was contended that "M.M." and "C.O. Kotdwara" would not mean that the accused-appellant was made to understand that he has a right to be searched before the Magistrate or a gazetted officer and therefore the compliance of the provisions of section 50 of the Act was not made. Both the above witnesses categorically stated that

the accused-appellant was made to understand and given option that his search may be effected in the presence of a Magistrate or a gazetted officer and that the accused-appellant did not opt to be so searched and volunteered that his search may be taken by the arresting police party. There is absolutely nothing in the cross examination of these witnesses as may indicate any infirmity or discrepancy in this regard. Those witnesses having said so in unequivocal terms the above deviation of the description in memo, Ex.Ka.3 can not be taken to imply that the accused-appellant was not made to understand about his right and option to be searched before a Magistrate or a gazetted officer. The memo of search, recovery and arrest is a corroborative piece of evidence and is supposed to contain the recital which in fact there and therefore substantial compliance of the above provision was proved in the matter of search and seizure of contraband. The memo is supposed to contain the gist of the proceedings of the search, recovery and arrest and there is no legal requirement that it should contain the words verbatim as spoken to by the leader of the police party to the accused-appellant when he was made to understand and was given option about the right and search before a Magistrate or a gazetted officer.

(16). Learned Amicus Curiae placed reliance on the decision of the Apex Court in the case of State of Haryana Vs. Vikram Singh; 2002(1) Supreme, 232 in support of the contention that if the F.I.R. did not contain any averments to the effect that an offer to be searched before a Magistrate or a gazetted officer was made and this factum was sought to be proved by oral evidence of a witness, the requirement of the provisions of section 50 of the 'Act' would not be established. In the instant case the F.I.R., Ex.Ka.4 was lodged and registered on the basis of the memo, Ex.Ka.3 at the instance of the leader of the police party. The relevant averments referred above prove that offer of search stipulated under section 50 of the 'Act' was supported by the documentary evidence and the factum was corroborated by the evidence of the two witnesses. In the case of *Joseph Fernandez Vs. state of Goa; (2000) 1 Supreme Court Cases 707* the ratio of the decision was that there will be substantial compliance of the said provision by informing the suspect that "if you wish you may be searched in the presence of a gazetted officer or a Magistrate."In the instant case the requirement of informing the suspect of his right to be searched before a gazetted officer or a Magistrate

also stand established and proved by the evidence of both the witnesses of the search, recovery and arrest as well as the memo prepared then and there.

(17). In view of above there is no force in the submission of the learned counsel that the compliance of the provision of section 50 of the 'Act' was not proved and the decision cited by her at the bar has no bearing on the facts of the case.

(18). The arrest of the accused-appellant was made from the bus stand. P.W.1 and P.W.2 admitted that the place was crowded. The learned Amicus Curiae submitted that inspite of this no public witness was procedure to witness search, seizure and arrest of the suspect. It has come in the evidence of P.W.1 and P.W.2 that efforts wer made to procure the public witnesses but none agreed. It is not uncommon that at a bus stand people and anxious to board the passenger bus so as to reach their destination in time and therefore they do not like to be delayed by offering themselves to be the witness of any such incident. Therefore there is nothing unusual if none of the person present at the bus stand agreed to be the witness of the occurrence. An informer had given the tip to the leader of the police party in the market where police party was on duty to maintain law and order and since it was told that the suspect is about to board a bus for Delhi with contraband the police party was left with little time to convince any public witnesses and took them to be the witness of the incident. Consequently absence of public witnesses do not tell upon the credibility of the police witnesses. Further the occurrence took place at a public place during day time and where it can not be assumed that police personnel may carry bulky contraband weighing about two quintals for planting on the accused-appellant without the knowledge of public at large. The accused appellant has not disputed his presence at the bus stand and even admitted in his statement under section 313 of the Code of Criminal Procedure that he had purchased a ticket at the bus stand of Kotdwara of boarding a bus for his destination. The evidence is convincing that he was found sitting on the bundles of the contraband and therefore possibility of his false implication at a public place with a huge quantity of contraband is ruled out. Therefore there is nothing to create any doubt in the claim of the prosecution and the reliability of its evidence as adduced in the case.

(19). Soon after the occurrence the accused-appellant was taken to the police station where the F.I.R. was lodged and case was registered vide G.D. report No. 38 of 19.45 dated 15.11.1998. The serial packets of the contraband i.e. Charas and Ganja seized as well as sample packet duly scaled were received there at the police station and properly kept in the Malkhana. P.W.1 supported this fact in his evidence which is also corroborated by the averment of the said G.D. report, Ex.Ka.5. The packed and sealed samples of Charas and Ganja were received by constable Than Singh P.W.4 and he took these to Chemical Analyst on 27.11.1998 vide authority letters, Ex.Ka.7 and Ex.Ka.8 and proved that these packets were kept as such without being tampered and were handed over for chemical analysis at Agra. Learned Amicus Curiae submitted that the sample of the seal which was affixed on the packets at the spot was not affixed on the memo of search, seizure and recovery, Ex.Ka.3 and therefore there was no guarantee that these packets were kept un-tampered in the Malkhana and also in the transit for chemical analysis. Affixing sample of the seal on the memo, Ex.Ka.3 was not legally required and considering the definite evidence of the witnesses there remains no scope for any assumption against the prosecution. In other words there being no discrepancy apparent in the recovery, seizure and deposit of the packets in the Malkhana, the prosecution evidence of the above witnesses prove that search and seizure has been beyond suspicion and also proved by the clinching evidence of the prosecution. Considering this the ratio of decision of the Apex Court in the case of Bahadur Singh. Vs. State of Madhya Pradesh and another; 2002 Criminal Law Journal 579 (S.C.) relief upon on behalf of the accused-appellant to contend that deposit of the contraband in the Malkhana in un-tampered state was not supported by independent evidence and therefore the claim of the prosecution became doubtful, is not applicable to the facts of the instant case.

(20). The expert reports, Ex.Ka.1 and Ex.Ka.2 have proved that the samples sent for chemical analysis were found to be or Charas and Ganja respectively and the learned Sessions Judge was also therefore justified in holding that the substances seized from the accused-appellant were the narcotic substances of the above descriptions.

(21). Lastly it was argued that the prosecution evidence is completely silent about the source of acquisition of the contraband by the accused-appellant and that this aspect of the matter create suspicion in the prosecution case. The I.O., R.K. Sharma (P.W.3) had made query from the accused but did not made any investigation as to from where the accused-appellant brought the contraband. There was no legal requirement to trace the source of acquisition and therefore this is not an infirmity which may entail rejection of the prosecution story. No material infirmity in the investigation of the case was otherwise pointed out and therefore the same being fair does not admit of any inference favourable to the accused-appellant.

(22). For the reasons stated above we are of the view that the accused-appellant has rightly been convicted under section 8/20 of the N.D.P.S. Act for having been found in possession of 100 grams of Charas and two quintals of Ganja(Bhaang) at about 5.30 p.m. on 15.11.1998 at bus stand Kotdwara. The quantity of Ganja being commercial per notification issued in exercise of the powers conferred by sub-section (2) of section-1 of the N.D.P.S.(Amendment) Act, 2001 by the Central Government and the table annexed therein, the sentence of 15 years R.I. and fine of Rs. 1,50,000-00(one lac & fifty thousands) can not be said to be un-reasonable. However as submitted that mollification of the rigour of sentence for possessing 100 grams of Charas, a small quantity per said notification, is legally permissible and in the interest of justice the sentence awarded under this court under section 8/20 of the 'Act' is reduced to R.I. for 6(six) months. The appeal is to be disposed of accordingly.

(23). The appeal is partly allowed and is disposed of accordingly.

(24). The appellant is in jail. He shall serve out the sentence as modified above. Let the record be sent to the court concerned for compliance.

(Hon'ble Irshad Hussain, J.) (Hon'ble P.C.Verma,J.)

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